AMERICAN TELEPHONE AND TELEGRAPH CO. ET AL.

IBLA 82-343 Decided November 14, 1983

Appeal from decision of Director, Bureau of Land Management, providing instructions for the reappraisal of microwave transmission site rights-of-way. W-0165715, et al.

Affirmed as modified; remanded for reappraisal.

1. Appraisals--Communication Sites--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

   The preferred method for appraising the fair market value of nonlinear rights-of-way, including microwave transmission sites, is the comparable lease method of appraisal where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites.

2. Appraisals--Communication Sites--Rights-of-Way: Appraisals

   Where either the comparable lease or comparable sale method is used to ascertain fair market value of a communications site, such method automatically includes consideration of residual damages and benefits; therefore, the "before and after" test cannot properly be applied in conjunction with either method.

APPEARANCES: Richard A. Bromley, Esq., San Francisco, California, for appellants; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company have appealed from a decision of the Director (Director),

Bureau of Land Management (BLM), dated November 19, 1981, providing instructions for the reappraisal of various microwave transmission site rights-of-way situated in Wyoming, Arizona, Washington, and California. 1/

This case has been the subject of prior administrative adjudication. In American Telephone & Telegraph Co., 25 IBLA 341 (1976), we reviewed decisions of the various BLM state offices increasing the annual rental charges for the subject rights-of-way pursuant to reappraisals of the land involved. The rights-of-way were originally granted in the 1950's and 1960's pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), subject to valid existing rights). The applicable regulation, 43 CFR 2802.1-7 (1976), provided that the charge for use and occupancy of a right-of-way would be its "fair market value," subject to revision every 5 years "after reasonable notice and opportunity for hearing." Because no opportunity for a hearing had been afforded to appellants in connection with the Wyoming, Arizona, and Washington rights-of-way and because of certain deficiencies with respect to the hearing held in connection with the California rights-of-way, we remanded the case to the Hearings Division for assignment of an Administrative Law Judge to conduct a hearing and render proposed findings of fact.

A hearing was subsequently held from September 12 to September 22, 1977, before Administrative Law Judge E. Kendall Clarke in San Francisco, California. In connection with the hearing, both appellants and BLM submitted various reappraisals of the subject rights-of-way. Appellant's reappraisals, however, were limited to the California rights-of-way. On November 7, 1978, Judge Clarke issued a recommended decision in which he set aside the BLM annual rental charges for all the rights-of-way and adopted certain rental charges with respect to the California rights-of-way, based on appellants' analysis with certain modifications.

In his decision, Judge Clarke first ruled that BLM had improperly determined that the highest and best use of the subject parcels for appraisal purposes was for "special use." The highest and the best use of the parcels, according to Judge Clarke, should have been considered to be "investment speculation" (Decision at 55-58). Judge Clarke then rejected the data developed by BLM on comparable leases:

> The BLM has appraised the fair rental value according to the comparable lease method. In order for this method to be accurate, a search for comparable leases should be made according to

1/ This case involves the following 14 rights-of-way: Wyoming -- Rock River (W-0165715) and Creston (W-0165717); Arizona-Holbrook Junction (AR-06350); Washington -- Tekoa (WASH-02500); California -- Whitewater Mountain (R-530), Granite Pass (R-02414), Belle (R-02415), Turquoise (LA-0111884), Mountain Pass (LA-0113528), Kelso (LA-0166526), Glamis (LA-0168276), Hector (LA-0168775), Bess (LA-0170408), and Lucerne (LA-0170409). In their post-hearing brief at page 1, appellants state that right-of-way R-530 (Whitewater Mountain) is owned by General Telephone Company. No appeal has been filed by General Telephone Company.

> each site's highest and best use. Organic Act Directive No. 77-30. However, as stated in the BLM's Instruction Memorandum No. 73-295 (Ex. 27), "the appraiser's conclusion as to the highest and best use is not an end in itself. It is a step in the appraisal process which guides the appraiser in the selection of comparable leases."
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> AT&T contends an incorrect determination of the highest and best use would lead to an incorrect appraisal since the highest and best use determination controls the direction of the market data search . Mr. Brownell agrees with this contention. It was his opinion that if the comparable leases used in his appraisal were something other than for special use, then they would not be appropriate, and the data he has gathered would not be helpful. Since it is clear BLM has relied on "special use" comparables rather than "special purpose", their appraisals in California are in serious question. [Footnotes omitted.]

(Decision at 58-59).

Having rejected the comparable lease data utilized by BLM in its appraisals, Judge Clarke then examined the comparable sale approach advocated by appellants. Judge Clarke adopted this approach with certain modifications, 2/ and established specific annual rentals for 9 out of the 10 California sites. With respect to the Whitewater site in California, owned by General Telephone Company and for which no comparable sale data was introduced, as well as the Arizona, Washington, and Wyoming sites, for which there was a similar lack of sales data, Judge Clarke recommended that the matter be remanded to allow a more thorough reappraisal consistent with Organic Act Directive (OAD) No. 77-30 and his opinion.

In accordance with our original decision in American Telephone & Telegraph Co., supra at 359, the case was then transmitted to the Director, BLM, who had been directed to establish "any new charges reasonable and proper under the regulation." In his November 1981 decision, the Director declined to adopt Judge Clarke's rejection of the comparable lease approach. Recognizing, that the hearings below had highlighted certain deficiencies in the comparable rental data used in computing appellants' annual rental, the Director remanded the cases to the appropriate BLM state offices, directing that new reappraisals be made "considering any more recent data that may be available, taking care to adequately address areas that were weak or incorrect in the original reports" (Director's Decision at 15). Accordingly, he set forth certain instructions to be followed in conducting the reappraisals. This appeal followed.

2/ Judge Clarke rejected appellants' argument that the comparable sales data which they developed should be adjusted downward to reflect benefits which flowed to adjacent Federal land by reason of the provision of access and power. This argument relating to proper utilization of the "before and after" test is examined, infra.

Initially, appellants attack the decision of the Director on the issue of highest and best use. Judge Clarke, in his decision, had held that the highest and best use of the California sites was not "special use," as contended by BLM, but was rather "investment speculation" (Decision at 58). While appellants admit that the Director purported to agree with Judge Clarke, they argue that the Director distorted Judge Clarke's holding by stating that "[w]hen considered as part of the larger ownerships (larger parcels), BLM now considers the highest and best use of the subject sites (California cases) to be portions of larger parcels, the highest and best use of which are for investment speculation" (Director's Decision at 5). Appellants attack this statement as follows:

> This definition is contrary to the finding of Judge Clarke, unsupported in the record and violative of the applicable appraisal standard. In the first place, the highest and best use of the larger parcel for which either the subject site or any "comparable" site was either leased or sold is not determinative of the highest and best use of the smaller parcel itself. The appraisers' job is to carefully examine all the geographic and physical characteristics of the site itself. The highest and best use of that site may or may not be the same as the land which surrounds it. In the matter now on appeal, all the subject sites, at the time of the taking, were unimproved and without power or access; they were each surrounded by miles of similar desolate hills; none of them possessed any distinguishing or unique characteristics; and the highest and best use of each site was found to be for investment speculation -- no different than the miles of surrounding land. The fact that they were small sites taken from a larger government holding should make absolutely no difference to the appraiser in the determination of highest and best use or in the selection of comparable market data. [Emphasis in original; Citations omitted.]

(Statement of Reasons at 5-6).

In one sense, we believe appellants argument is misdirected. Insofar as the Director's statements were directed to the specific parcels at issue before us, they were merely declaratory of admitted facts. Both sides now agree all the land involved has a highest and best use for investment speculation. We recognize, however, as appellants point out, that situations may well occur where the specific parcel for which a lease is sought differs in highest and best use from the remainder of a larger parcel of which it is a part. In such a case, the proper highest and best use will be that of the specific parcel. But, the larger parcel must be considered when the question of consequential damages to remaining land is at issue.

[1] The real objection of appellants to this facet of the Director's decision is that they perceive it as permitting utilization of communications lease comparables. This concern is, indeed, the essence of the argument being pressed on the appeal, viz., that consideration of communication lease comparables necessarily requires advertence to the use of the parcel being leased, and therefore, cannot be allowed. While we do not agree that the mere fact that a specific site is evaluated as part of a larger parcel necessarily implies that communication site lease comparables will be used, this point

is not particularly relevant, since, for reasons given below, we expressly hold that fair market value is properly computed by using such lease comparables.

Appellants argue that:

> Judge Clarke properly concluded that a site derives its value from its own location and physical characteristics, not from its value to a particular person or its proposed use. (Clark, p. 56). The fact that the user may intend a use which does not conform with the existing use of the surrounding land or larger parcel is wholly irrelevant either in the determination of highest and best use or in the estimate of fair market value. [Emphasis in original.]

(Statement of Reasons at 8). While appellants are correct insofar as the determination of highest and best use is concerned, they are demonstrably wrong in seeking to apply this standard to the ascertainment of the fair market value of the sites in question.

The mere fact that an individual is interested in acquiring a specific parcel does not serve to alter the determination of the highest and best use of that parcel. In other words, the fact that a casino operator is desirous of leasing land which has, at the time of the transaction, a highest and best use as grazing land, does not have the effect of conferring upon the land a highest and best use class as land suitable for casino operations. Rather, the highest and best use of a piece of land is determined without reference to any intended use by a particular interested party. In the instant case, the fact that appellants seek the land for communication site purposes does not work to alter the highest and best use classification as land best suited to investment speculation. It does not follow, however, that, having established the proper market for selecting comparables (investment speculation lands), no reference can then be made to the intended use in ascertaining what are comparable transactions. The opposite is, in fact, the case.

As we noted in Pacific Power & Light Co., 65 IBLA 50, 54 (1982), "The crucial issue, in any event, is not so much that of highest and best use as that of the value of the land. Viewed in perspective, highest and best use is merely a tool to determine what is, in fact, a comparable sale." The desired goal of any property appraisal is to determine fair market value, for purposes of either sale or rental. In American Telephone & Telegraph Co., supra, we noted that all of the parties agreed that, in the context of 43 CFR 2802.1-7(a) (1976), fair market value "is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Id. at 349-50. In such a construct, however, reference to the intended use is absolutely essential. By way of example, a 20-acre parcel of land may have a highest and best use for livestock grazing. A private owner, who was willing to rent his land for forage purposes at a relatively low rate, would not necessarily offer the same rate of rental to a corporation who intended to use his land for tailings disposal. Rather, quite apart from

the ability or willingness of the corporation to pay higher rental, the use to which the land was to be put would properly be considered in setting the fee. It is, indeed, a reality of the marketplace that rentals are dependent, to a lesser or greater extent, upon the intended use of the lessee.

Ultimately, of course, the marketplace itself prevents lessors from overreaching. If, for example, a lessor attempts to extract a price beyond that which the lessee feels is justified, the lessee can ordinarily go someplace else. There are, admittedly, situations in which a great disparity of bargaining power exists. Thus, while a lessee as an initial matter may have great leeway in determining the locus of his activities, once it has expended substantial funds on a specific site its freedom to go elsewhere is circumscribed by recognition of the investment which it stands to lose by relocating. In such a situation a lessor might well be able to extract a premium above what the marketplace would indicate was justified. Indeed, it is precisely because of the uncertainties surrounding private lease renewals that we are directing that private communication site renewals not be used in the comparable lease analysis. See discussion, infra. But, assuming that relevant site differences can be discounted, comparable leases for communication sites, negotiated by private parties in arms-length transactions, involving land whose highest and best use is retention for speculative investment, are the best evidence of fair market value, for they are, in fact, the result of the meeting of the minds between a willing buyer and a willing seller.

Appellants argue the Board previously adopted the position that they advocate with regard to proposed uses. We recognize that in American Telephone & Telegraph Co., supra at 355, the Board quoted from Instruction Memorandum (IM) No. 73-295 as follows:

> The proposed use should have no influence on the estimate of the use fee. The features and characteristics of the site determine its usefulness for this, or any other use, and the fee will vary according to the desirability of those features. The type or name of the proposed or existing user should have no influence on the fee.

While the decision did not discuss the import of this provision, its inclusion, at least inferentially, represented the silent concurrence of the Board in its substance. In actual fact, however, while this language does in limited circumstances correctly state some relevant considerations in ascertaining fair market value, we are of the view that, as a rule of general applicability, it does not withstand analysis.

First of all, it is clear that the Board did not focus on this language in its original decision. The discussion which immediately follows the quotation from IM No. 73-295 expressly affirms the use of comparable lease data. If, indeed, it was the intent of the Board to prohibit any reference to use in ascertaining comparables, the Board would have, at that time, instructed BLM not to focus on comparable communication site rental data. In

actual fact, the Board rejected the comparables used therein not because they focused exclusively on communications site rentals, but rather because it was not clear that the communication site comparables utilized by BLM were comparable to the sites being appraised. The entire thrust of that decision belies the construction which appellants seek to put upon it. 3/

Secondly, if the Instruction Memorandum is rigidly applied, as appellants assert it should be, the ensuing results are meaningless. One of apellants' arguments discussed below is that the range of comparable lease rentals is so wide in ambit that it is useless as a guide for deriving fair market value. Under appellants' approach, however, comparable rentals would include not only rentals of comparable sites for communication purposes, but rentals of comparable sites for any other purpose. Thus, rental paid for use of a 5-acre parcel for grazing, for tailings disposal, for industrial development, and for use as a communications site would all be factored in and accorded equal weight. It is obvious that such an approach would result in rental figures of far greater disparity than presently exist. The ultimate conclusion which appellants would clearly have us draw is that such figures are so inherently meaningless that it is impossible to rationally apply the comparable lease method in ascertaining fair market value, and that, therefore, the comparable sale method should be adopted. This conclusion, however, is directly contrary to the express holding of American Telephone & Telegraph Co., supra. It is similarly contrary to Organic Act Directive No. 77-30, dated March 15, 1977, which stated that the comparable lease method is the "preferred method for determining fair market value for non-linear rights-of-way." Moreover, the fact that such additional data would serve to increase the disparity in rentals which already exists merely underlines the futility of such an approach.

Third, the predicate for such an approach necessarily resides in an assumption that limitation of lease comparables to situations where the lease is for communication site purposes distorts fair market value. This argument, however, stands logic on its head. The marketplace is the ultimate arbiter of fair market value. If no special premium is exacted in the marketplace for considerations of the use to which a site is to be put the prices charged by private parties will not reflect consideration of ultimate use and limitation of lease comparables to communications sites cannot logically result in an elevated figure. If, on the otherhand, such a consideration is an element in ultimate rental charges, consideration of use is part of fair market value,

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3/ It must be remembered that the key question under review in American Telephone & Telegraph Co., supra, was whether use as communication sites was the highest and best use of the subject parcels. The Board held that there was no evidence to support this classification. The Board also criticized some of the lease comparables on the ground that they were not all that comparable. Nothing in its decision, however, indicated that the comparables were invalid because they were limited to comparable communication site leases.

since that is what the market charges. Appellants' argument, in effect, says that market value, established in open dealings between parties of relatively equal bargaining power, is, somehow, not fair market value. On the contrary, such market value is, by definition, fair market value. If use is factored in by the market in determining rental values, the Government can require no less in setting its own rentals.

There are, however, situations in which the specific value of the site to the user may not properly be considered. Thus, while as an initial matter the selection of sites for bi-directional line of clearance presents a prospective lessee with almost an infinity of choices, once specific sites have been selected the range of acceptable alteration is drastically reduced. When viewed in isolation, each specific site, being substantially locked in by the location of two other sites, might have an exceptional value to the user. Such value, however, is not properly considered in ascertaining fair market value since such value relates only to the specific user and is, in reality, an element of disparity in bargaining power. To the extent that IM No. 73-295 was addressing this fact situation, we agree that such value to a specific user is not properly considered in fixing fair market value.

We hold, therefore, that the comparable lease rental approach in determining fair market value is permissible, and that such comparable rentals are properly limited to those for similar communication sites. 4/ Appellants, however, within the context of such an approach, make a number of subsidiary arguments to which we now turn.

Appellants contend that it is improper for BLM to use rental data from improved communication site leases because the availability of access and power makes them noncomparable. In American Telephone & Telegraph Co., supra at 352, we held that a reappraisal "should be based upon the physical condition of the right-of-way at the time the user properly commenced occupancy or at the time of grant thereof, whichever was earlier, with value adjusted to present value in that condition."

A first user right-of-way should be reappraised by reference to its unimproved state. Therefore, in order to insure comparability when using improved leases, the appraiser must adjust for that factor. In his November 1981 decision, the Director, BLM, stated that "[d]ifferences in access and availability of utilities are common problems dealt with in routine land appraisals" (Directors Decision at 10). However, he admitted that the impact of this factor on rental charges is "unclear," and stated that BLM appraisers are to determine its impact by questioning lessors and lessees. Id. at 16.

4/ The fact that IM No. 73-295 might be construed as contrary to the Board's position is immaterial. BLM Instruction Memoranda are binding neither on this Board nor on the public. See Bryner Wood, 52 IBLA 156, 161 n.2, 88 I.D. 232, 235 n.2 (1981); Milton D. Feinberg, 37 IBLA 39, 85 I.D. 380 (1978). Insofar as IM No. 73-295 is specifically concerned, we note that while it expressly permitted proration of rentals among multiple users, this Board has already directed that no such proration occur. See Circle L, Inc., 36 IBLA 260 (1978). In any event, IM No. 73-295 expired by its own terms on Dec. 31, 1974, and has, in effect, been supplanted by IM No. 77-30.

Appellants quote testimony given by Clifton Brownell, the BLM appraiser, regarding the desirability of using improved leases as comparables: "I wouldn't say it was entirely inappropriate, it just puts too big a burden on the appraiser to attempt to adjust for the presence of power and access" (Appellants' Posthearing Brief at 61). Appellants, however, have presented no evidence that BLM cannot make proper adjustments to comparables when access and power are present. While special care may be needed to properly adjust for the presence or absence of such amenities, we agree with the Director that such adjustments are not unusual in real estate appraisals.

Appellants also argue that it is improper for BLM to use rental data from communication site leases, stored in the Denver Data Bank, because of differences in highest and best use. Appellants rely on a summary of Brownell's testimony, contained in Judge Clarke's decision at page 49:

> In his appraisal, Mr. Brownell placed the most weight on transactions involving properties with the same highest and best use. However, he also felt that if the highest and best use was something other than special use, then the comparable leases used that have communication facilities on them would not be appropriate comparables. In such an event, the data from the Denver Data Bank would not be helpful in the BLM's appraisal. [Footnotes omitted.]

To the extent that appellants' objection goes to the use of comparable rental data where the highest and best use of the underlying land is something other than "investment speculation," we agree and hereby direct that such data not be used. However, insofar as the objection relates to use of comparable communication site lease data where the highest and best use of the land is for "investment speculation," we reject their argument for the reasons given above.

Appellants also contend that it is improper for BLM to use renegotiated leases as comparables because they "may manifest a drastically altered bargaining relationship between the parties" (Statement of Reasons at 10). Appellants point out that, in the case of renegotiated leases, the lessee had already often invested a considerable amount of money in improving the land and, thus, was "'locked-in' when the renegotiation occurred. (Tr. 863)" (Appellants' Posthearing Brief at 70). Moreover, in the case of microwave transmission sites, each site is further locked in by the fact that it is a link in a system requiring bi-directional line of sight clearance. In his November 1981 decision, the Director recognized "the impact that imbalance in bargaining position may have," but concluded that "we do not believe that renegotiated leases should be categorically disallowed from consideration" (Director's Decision at 13-14). He further argued that if "private renegotiated rentals were not obviously out of line with other data * * * the appraiser should be allowed to consider them," contending that, "renegotiated First User leases represent a similar situation to First User BLM sites undergoing rental revisions."

We agree that both cases present a "similar situation," but that this fact by no means implies that the rental values are comparable. We have determined to disallow the use of renegotiated private leases as comparables

in view of the substantial danger that, owing to a disparity in bargaining power, the lessor took advantage of his dominant position. It is always difficult to ascertain motivations. And, even when ascertained, quantifying such factors is virtually impossible.

In any event, we fail to see what value consideration of renegotiated private leases can provide where their inclusion is dependent upon whether they are "out of line with other data." Such a standard only permits inclusion of renegotiated lease rentals when the rentals are consistent with independently developed data. But, if this data has already been developed, there is no need to consider additional factors, particularly where such factors will be considered only if they are corroborative of what already has been ascertained. Consideration of renegotiated private leases, under such conditions, adds nothing of substance to the appraisal process. We conclude, therefore, such renegotiated private leases should not be used as comparable leases. 5/

Appellants also contend that it is improper for BLM to use private communication site leases as comparables because of qualitative differences between BLM rights-of-way and private leases. Appellants point out that BLM rights-of-way differ in that all grants provide for discontinuation or modification by the Secretary, nonexclusivity, and rental revision every 5 years. Each of these provisions is mandated by Departmental regulation. In his November 1981 decision, the Director concluded that BLM appraisers should consider the "relative probability" that the user will face increased rental charges during the term of the lease or grant (Director's Decision at 16). With respect to the other conditions, the Director stated that the probability they would be invoked was remote and, therefore, need not be considered.

We have recently recognized that the terms and conditions of BLM rights-of-way, where they differ from private lease comparables, may affect

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5/ We wish, however, to distinguish clearly between use of renegotiated private leases and use of renegotiated Governmental leases as comparable leases. The considerations that have impelled us to bar use of renegotiated private leases lead us to the opposite conclusion insofar as Government leases are concerned. Inequality of bargaining power does not arise in Government renegotiations. Unlike the situation in private renewals where the lessors are normally neither constrained by statutory authority nor subject to independent review of the fairness of their assessments, the Government can only properly charge fair market value and cannot exact a premium based on inordinate bargaining leverage. Should a Government lessee object to a specific rental as in excess of fair market value, he has recourse both to this Board and to the Federal courts to contest the valuation placed on his lease. The final figures arrived at, be that through acceptance by the parties or ultimate decision of this Board or the courts, clearly represent, for that lease, the fair market value. As such, these figures may indeed be the best evidence of fair market value for other renewals. Moreover, because they are free of the taint of possible abuses in bargaining power, their use would not be constrained by the extent to which they fit parameters developed from other data. There is no valid reason to interdict their use. See generally Denver & Rio Grande Western Railroad Co., 71 IBLA 352, 355 (1983).

comparability, and that BLM appraisers properly took these differences into account. These differences included the possibility, even though deemed remote, of discontinuation or modification by the Secretary, nonexclusivity, and rental revision every 5 years. We note that, in some cases, private leases may be comparable to BLM rights-of-way with respect to certain terms and conditions. In such a situation, no adjustment need be made. But, in evaluating the comparability of private leases, BLM should take into account all of the differences which might affect fair market value. It may be that provision for lease termination, nonexclusivity, and the like may have only a limited effect upon fair market value. Absent evidence of this, however, we are not disposed to rule upon this question at the present time. If BLM believes that certain differences between private comparables and Government leases have no effect on ultimate comparability for valuation purposes, the basis for its belief must be documented.

Appellants also contend that the rental data used by BLM in the 1977 reappraisals was unreliable. Appellants base this conclusion on the fact that "the rentals being charged for relatively comparable sites varies all over the board" (Appellants' Posthearing Brief at 53). Appellants offer a number of examples of this variation. Id. at 53-55. In his November 1981 decision the Director admits that there was divergence between the low and high comparables used in appraising the various sites, but noted that an even greater divergence existed in the comparable sales data submitted by appellants. Appellants contend that BLM has been unable adequately to explain that variation by reference to the usual market factors, e.g., supply and demand, the physical characteristics of the sites or the quality of the leases.

Given the limited number of comparables available in rural areas, it is likely that anomalous comparables will be identified. In such a case, the comparable should be excluded. As OAD No. 77-30 notes, where rental data is acquired over a broad geographic area, such data should indicate a "reasonably uniform pricing pattern" such that "[d]ifferences between sites can be identified and by careful analysis some sites can be eliminated as comparables while adjustments or comparisons may be made for others." This is not to suggest that rental data must fall within a fairly narrow range, only that differences be explainable by reference to some discernible market factor, whether it be the physical characteristics of the sites or the motivations of the parties. Appellants have failed to establish that either all data is inherently reliable or that BLM will be unable to identify and exclude truly anomalous comparables.

Appellants also argue that the BLM rental data was unreliable on the ground that the rental values determined to represent fair market value of a leasehold bore no reasonable relation to the underlying fee value. The premise of appellants' argument is that the rental value determined by the comparable lease method of appraisal should be somewhat similar to the value of the underlying fee determined by the comparable sales method of appraisal when subjected to a reasonable rate of return. In this sense, the comparable lease and comparable sales method of appraisals should be mutually reinforcing. In the present case, appellants contend that they are not (Appellants' Posthearing Brief at 57-58).

BLM suggests that the rental value may not be reasonably related to the underlying fee value due to the adverse impact of a nonconforming use, of a portion of land, on the larger parcel of land of which it is a part, i.e., "severance damages" (BLM's Hearing Brief at 28). BLM asserts that this "damage" factor (as well as any "benefits" factor) is considered by the parties to the private leases and automatically taken into account under the comparable lease method of appraisal. Id. at 28-29. Appellants admit that severance damages might properly account for the lack of a reasonable relation between fee and rental values, but argue that BLM has presented no evidence to establish that the parties to private leases took such damages into account when setting rental charges (Appellants' Posthearing Reply Brief at 18-19).

Appellants contend that the lack of a reasonable relation between fee and rental values is due not to severance damages but to factors unrelated to fair market value, e.g., a desire on the part of private landowners to charge "'all they can get,'" as two owners of comparable sites admitted at the hearing. Id. at 21. While we have no doubt that owners attempt to maximize their return, this, in and of itself, does not represent overreaching. The concept of fair market value assumes that each side will attempt to achieve the best possible result from its perspective. Thus, while lessors may seek to obtain "all they can get," lessees seek to pay "as little as possible." Where, indeed, a prospective lessee is not constrained by other factors, such as need for a specific site, its election to pay lessors "all they can get" is, in reality, the payment of fair market value, since it is the marketplace which determines what "they can get."

More fundamentally, the argument of appellants is grounded in a faulty premise. In reviewing some of the comparables used by BLM in developing fair market value, J. A. Gallagher, who conducted an independent appraisal for AT&T, noted that most of the rentals used exceeded the fair market value of the underlying estate. He arrived at this conclusion by assuming that the rental represented a 10 percent rate of return on the value of the underlying base fee and then computing the per acre value. He concluded that, for "Comparable #049" the effect of an annual rental charge of $1,800 was to value the land under lease at $6,000,000 per acre. Obviously, the land was not worth anything near this amount. Thus, he concluded that the comparables were, by and large, meaningless and must, therefore, be presumed to be the result of inequality of bargaining power.

The problem, however, is that this approach simply has no meaning insofar as communication site rentals are concerned. In B & M Service, Inc., 48 IBLA 233 (1980), appellant made a similar argument objecting to an annual rent of $500 for a site consisting of .003 acre. Appellant argued that this was, in effect, a rental rate of $166,667 an acre (which would, under AT&T's analysis, represent a fee value of $1,666,700 an acre), and further complained that the most comparable site was also assessed at $500 even though it consisted of .23 acre, or 76 times more land. In rejecting this argument, the Board noted that application of the mathematical formula advanced by the appellant, assuming that the comparable site was correctly valued, would result in a finding that the fair market value of its site would be approximately $6.57 annually, which, we noted, even appellant had not suggested represented fair market value. In B & M Service, Inc., supra, the Board

concluded "as regards communication sites, the size of the site is not of particular importance in ascertaining fair market value. * * * While size may become a relevant factor in determination of rental when the area granted is above the average, even then, the rental is not directly related to the number of acres." Id. at 237.

The instant case closely parallels the fact situation disclosed in B & M Service, Inc., supra. Thus, "Comparable #049" consisted of .003 acres. A charge of $5, which is the minimum allowable, would, in effect, be equivalent to $1,665 an acre thereby establishing a fee value of $16,650 an acre, assuming the rental represented a 10 percent rate of return on the fee value. This, too, is vastly in excess of the true per acre value of the comparable.

It is precisely the small area of the comparable that results in the seeming disparity. Indeed, of the 10 comparables scrutinized in the Gallagher appraisal, only three contained in excess of a single acre, and the remaining seven each consisted of less than one-tenth of an acre. See Exh. H-1 at 33-36. All three sites that were over an acre had a per acre value of under $8,000. In contradistinction, the lowest valuation of the remaining seven sites, all of which were less than one-tenth of an acre, was $68,750 an acre. A review of these figures reinforces our original conclusion in B & M Service, Inc., supra, that there is simply no direct mathematical correlation between size of a communication site and fair market rental, particularly where the size is in the subacre category.

Appellants also contend that the rental data in the 1977 reappraisals was materially inaccurate and not adequately verified. These charges are documented. See Appellants' Posthearing Reply Brief at 13-17. In his November 1981 decision the Director admitted to unspecified inaccuracies, but stated that in future reappraisals "[e]very effort will be made to obtain accurate details on the comparable lease data" and "to verify leases with the lessor as well as the lessee." (Emphasis in original.) This is the only acceptable approach.

We, therefore, conclude that under the guidelines enunciated above, BLM may use the comparable lease method of appraisal in reappraising the subject properties.

[2] The final issue which appellants raise is whether BLM adequately took into account the benefits resulting to unleased Government land from the provision of access and power to the leased lands by appellants. Appellants argued that such benefits should properly be considered in conjunction with the comparative sales approach. Having derived fair market value for the subsisting fee estate involved, they then computed fair market rental value by assuming a 10 percent rate of return. The figure derived was then subject to a reduction to take into account the benefits which appellants alleged their activities caused on the surrounding land which remained in Government ownership. This last step, they argued, was part of the "before and after" method of appraisal, and it is this "before and after" computation which appellants assert BLM ignored.

Judge Clarke, in his decision, rejected this approach. He noted:

> Nowhere in any accepted appraisal method for the determination of fair market value of real property is comparable sales used with the "before and after" method. The "before and after" method is an aspect of determining consequential damages or offsetting benefits in order to award "just compensation" in a condemnation proceeding. See U.S. v. Grizzard, [219 U.S. 180 (1911)]. Uniform Appraisal Standards, supra at 25. In the Organic Act Directive 77-30, "Damages and special benefits are not to be considered in appraisals based upon rental data from comparable leases or site sales (emphasis added) since such rentals or sales automatically reflect damages and special benefits to the landowner.

(Decision at 60).

We find ourselves in total agreement with Judge Clarke on this point. In United States v. Honolulu Plantation Co., 182 F.2d 172 (9th Cir. 1950), the court noted:

> It is a rule that, in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership. It is a rule that, if market value cannot be established by sales of comparable property, consideration of other factors may be necessary to establish just compensation. But it must not be forgotten that the market value of real property is the criterion, and losses to a business are not for consideration. [Emphasis is supplied.]

Id. at 176.

The rationale for the utilization of the "before and after" test in condemnation proceedings rests both in the nature of the Governmental action occurring and in the Constitutional requirement that the taking of private property for the public good be compensated. Thus, when the Government initiates a condemnation proceeding it is required to aver that it is seeking the land for public purposes. It often happens, in the context of a partial taking, that the fulfillment of the public purpose has a beneficial effect on that part of the private lands not taken. In such a situation, the benefits are properly offset against the taking. As the Supreme Court explained in United States v. Sponenbarger, 308 U.S. 256 (1930):

> The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer benefits when measured in the whole to compensate the landowner further would be

> to grant him a special bounty. Such activities in substance take nothing from the landowner.

Id. at 267.

The reason why the "before and after" test developed as a special rule in condemnation cases relates to the unusual nature of, as well as the reasons for, the Government's acquisitions. Thus, the Government often requires land for such varied ends as flood control, bombing ranges and other purposes for which the private marketplace simply has no counterpart. While the underlying fee value of the land acquired may be amenable to determination through a study of comparable sales in the marketplace, the unusual nature of the Governmental project may result in damages to the remaining fee which do not have a counterpart in the market. It is the lack of market data which necessitates recourse to the "before and after" test in such circumstances. But, even in condemnation cases, if truly comparable sales can be established in the marketplace, there is no need to resort to the before and after test since a willing buyer and a willing seller would consider both the "damages" and the "benefits" to the remaining land in reaching the fair market value.

Under the comparable lease or comparable sales method it is presumed that both parties to the transaction were knowledgeable and willing. Thus, the purchaser or lessee would be aware of any benefits which resulted to the remaining land from his activities while the seller or lessor would be similarly aware of any detriment which the remaining lands suffered. The rental or purchase price would thus include, by necessity, the offsetting of these competing values. Unlike the situation which arises in many condemnation cases, acquisition of land for use as a communications site is a not uncommon occurrence in the private sector. Regardless of whether situations outside of condemnation could occur which, because of a lack of comparable sales and rentals, necessitate recourse to the "before and after" method in order to ascertain value, it is demonstrably invalid to apply the test to figures obtained from analysis of comparables. Doing so, in effect, constitutes double counting since both the damages and benefits have already been factored in the comparable leases or sales. We expressly hold that, where either comparable sales or comparable leases are used to determine fair market value, the "before and after" test is no longer applicable. 6/

Appellants also suggest that the provision of power and access has had a beneficial effect on the sites, themselves, thereby making it more likely that third parties will use them. This benefit, they suggest, should be considered in setting their rentals. We disagree. We have already noted that lack of exclusivity is properly considered in determining comparability between sites, such that, where a comparable lease grants exclusive use, the rental obtained by the lessor must be discounted since Governmental grantees do not acquire

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6/ It is, of course, true that where a comparable lease already has both access and power, the presence of these amenities will be considered in the negotiations of parties. This, however, merely underlines the importance of taking care that leases used for comparability purposes be closely examined so that proper consideration may be made of such factors which do influence fair market value.

exclusive use. Thus, lack of exclusivity is already a factor which is properly considered in determining fair market value. It is true that a secondary user at an improved site will be charged more than the primary user who found the site unimproved. This possibility, however, was established at the time that the primary user received the nonexclusive grant. If we allowed the primary user to be compensated initially for the fact that the grant was nonexclusive, and then, again, because someone else actually used the site, we would be permitting independent compensation for first the theory and then the practice of nonexclusivity. We reject this contention.

Pursuant to the guidelines enunciated in this decision, the case will be remanded to BLM for reappraisal of appellants' microwave transmission sites rights-of-way. Appellants will, of course, have a right to appeal from such reappraisals. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified and the case is remanded to BLM for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

7/ We note earlier that the Whitewater site (R-530) is presently owned by General Telephone Company of California (GTC). While GTC received notice of the hearing (see ALJ Dec. at 63), it failed to participate before Judge Clarke, the Director, or this Board. As we noted in Western Slope Gas Co. (On Reconsideration), 43 IBLA 259 (1979), any adverse party has an obligation to affirmatively protect its own rights. This, GTC has egregiously failed to do. The Director, however, set aside the original fair market appraisal of the GTC site. While we will permit BLM to reappraise the Whitewater site, we wish to make it clear to GTC that a similar failure to act to safeguard its rights in the future will result in a summary affirmance of any BLM appraisal.